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Supreme Court, U.S.
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No. 00-973

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a district court's failure to advise a counseled defendant at his guilty plea hearing that he has the right to the assistance of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court.

2. Whether, in determining if a defendant's substantial rights were affected by a district court's deviation from the requirements of Rule 11(c)(3), the court of appeals may review only the transcript of the guilty plea colloquy, or whether it may also consider other parts of the official record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 224 F.3d 1152. A prior opinion of the court of appeals, which was withdrawn on rehearing (Pet. App. 11a-22a), is reported at 211 F.3d 1109.

JURISDICTION

The initial judgment of the court of appeals was entered on April 20, 2000. The judgment of the court of appeals on rehearing was entered on September 14, 2000. The petition for a writ of certiorari was filed on December 13, 2000, and was granted on February 26, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

1. Rule 11(c) of the Federal Rules of Criminal Procedure, titled "Advice to Defendant," provides, in pertinent part:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> * * * * *
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination.

2. Rule 11(h) of the Federal Rules of Criminal Procedure, titled "Harmless Error," provides:

> Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

3. Rule 52 of the Federal Rules of Criminal Procedure, titled "Harmless Error and Plain Error," provides:

> **(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following guilty pleas, respondent was convicted in the United States District Court for the Central District of California on one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371; one count of aiding and abetting armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) and 18 U.S.C. 2; and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). See Pet. App. 2a-3a. Respondent was sentenced to 97 months' imprisonment, to be followed by three years' supervised release. *Id.* at 24a-25a. The court of appeals vacated respondent's guilty pleas and sentence, and remanded for further proceedings. *Id.* at 10a.

1. On February 27, 1997, respondent was arrested on a criminal complaint that charged him and two others with armed bank robbery and with using and carrying a firearm during and in relation to a crime of violence. J.A. 12-13. On February 28, 1997, respondent made his initial appearance on the complaint. At that appearance, the magistrate judge advised the defendants who were present, including respondent, of their constitutional rights, including "the right to retain and to be represented by an attorney of your own choosing at each and every sta[g]e of the proceedings against you," and the right "to request that the Court appoint an attorney to represent you" if "you cannot afford an attorney." J.A. 15. Respondent orally confirmed that he had heard and understood his rights. J.A. 18. The magistrate then found that respondent was indigent

and appointed a Deputy Federal Public Defender to represent him. *Ibid.*

On March 14, 1997, a grand jury returned a two-count indictment charging respondent with one count of armed bank robbery, in violation of 18 U.S.C. 2113, and one count of using and carrying a firearm during and in relation to that robbery, in violation of 18 U.S.C. 924(c). J.A. 19-20. On March 17, 1997, respondent appeared in court, represented by appointed counsel, for his arraignment. The magistrate judge advised the defendants present, including respondent, of their constitutional rights, including the right "to be represented by counsel at all stages of the proceedings," and also advised the defendants that, "[i]f you don't have the money or means to hire an attorney, I will appoint an attorney to represent you without cost or expense to you." J.A. 22. Respondent's counsel then provided the court with respondent's signed "Statement of Defendant's Constitutional Rights," in which respondent acknowledged his constitutional right "to be represented by counsel at all stages of the proceedings against [him]." J.A. 25, 26, 28.[1] Respondent's counsel also signed a statement at the end of the form indicating that counsel was "satisfied that [respondent] has read this Statement of Rights * * * and that [he] understands them." J.A. 29. That document was filed with the court. J.A. 4.

At the conclusion of the arraignment, the court, through the clerk, asked respondent personally whether he had heard and understood the statements of the court "[p]ertaining to [his] rights and the

[1] Because of a broken arm, respondent could not actually sign his name on the form; instead, he marked the signature line with an "X." J.A. 25, 28.

appointment of counsel," and whether he had seen and signed the statement of rights form. J.A. 25. Respondent answered both inquiries in the affirmative. *Ibid.*

2. On May 12, 1997, at a status conference before the district judge, respondent, represented by the same court-appointed counsel who had represented him at his arraignment and at three earlier status conferences, indicated his intention to plead guilty to the bank robbery count and to proceed to trial on the firearms count. J.A. 35, 37. Respondent's counsel explained to the court that respondent's position was that he participated in the robbery but that, contrary to the government's contention, he did not use a firearm during the robbery. J.A. 35. The court then asked respondent's counsel, in respondent's presence, whether there was "any point in taking this plea" since "[t]he jury is going to have to hear the whole case anyway * * * to figure out whether or not he used a gun." J.A. 36. Respondent's counsel reiterated that "my client's desire [is] to plead guilty to [the bank robbery charge]." *Ibid.*

The court then proceeded to engage in a colloquy with respondent, as required by Federal Rule of Criminal Procedure 11, to ensure that respondent's guilty plea was voluntary and intelligent and was supported by a factual basis. During the course of that colloquy, the court advised respondent that, by pleading guilty, he would be giving up certain constitutional rights, including the right against self-incrimination, the right to a trial, the right to confront and cross-examine witnesses against him, and the right to present evidence in his own behalf at trial. J.A. 38-40. Respondent stated that he waived those rights. J.A. 40.

The court did not expressly tell respondent at that time, however, that if he proceeded to trial, he would have the right to the assistance of counsel at that trial. That omission contravened Federal Rule of Criminal Procedure 11(c)(3), which requires the court, before accepting a guilty plea, to inform the defendant that he has (among other rights) "the right to be tried by a jury and at that trial the right to the assistance of counsel." Respondent's counsel did not object to the omission. The court then accepted respondent's guilty plea to the bank robbery charge. J.A. 43.

At the conclusion of the hearing, the court informed counsel for both parties, in respondent's presence, that the firearm charge was scheduled for trial on June 10, 1997. J.A. 45; Pet. App. 17a n.4. On the day before trial was scheduled to take place, however, the court rescheduled it to August 12, 1997, because the attorneys in this case were then in the middle of another trial. J.A. 47. At the status conference at which the court rescheduled the trial, the court addressed respondent personally to confirm his understanding that his trial had been continued because of the attorneys' scheduling conflicts. *Ibid.*[2]

3. On July 29, 1997, the grand jury returned a three-count superseding indictment charging respondent with bank robbery (to which he had already pleaded guilty), using and carrying a firearm during and in relation to a bank robbery, and a new third count, charging conspiracy to commit bank robbery. J.A. 48-52. On August 4, 1997, respondent, assisted by counsel, pleaded not guilty to the conspiracy and firearm charges. At that time, defense counsel also requested and obtained from the court another continuance of the trial, to September 9, 1997. Gov't C.A. Ex. Rec. 51-52.

[2] The court's order holding the continuance to be excludable time under the Speedy Trial Act stated that, "although defendant Vonn and defendant Vonn's counsel were initially prepared to go forward with this case * * * on June 10, 1997, defense counsel is no longer available to try this case on [that date]." Gov't C.A. Ex. Rec. 42-43.

On September 3, 1997, at a hearing, respondent stated his intention to change his plea on the conspiracy and firearms counts to guilty. J.A. 54. The court then once again advised respondent that by pleading guilty he was giving up certain rights. J.A. 58. Again, however, the court omitted specific mention of respondent's right to the assistance of counsel at trial, should he choose to go to trial. After the court determined that there was a factual basis for the guilty pleas, the Assistant United States Attorney stated in open court that she did not "remember hearing the Court inform the defendant of his right to assistance of counsel." J.A. 61. The court responded that "I didn't because [he] is represented by counsel." *Ibid.*[3] Respondent's counsel raised no objection to the court's failure to advise respondent specifically of his right to the assistance of counsel at trial. Respondent then entered his plea of guilty on the conspiracy and firearm charges, and the court accepted the plea. Resp. C.A. Ex. Rec. 29.

[3] Federal Rule of Criminal Procedure 11(c)(2) provides that, before accepting a guilty plea from a defendant who "is not represented by an attorney," the court must advise the defendant that he has "the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant." Rule 11(c)(3) requires, in every case in which a defendant seeks to plead guilty, that the court must advise the defendant about the right "to the assistance of counsel" at trial. That requirement, which is at issue in this case, is not limited to unrepresented defendants.

4. On May 14, 1998, respondent moved to withdraw his guilty plea on the firearm charge only, on the ground that it lacked a factual basis. The district court denied the motion. J.A. 62-65. Respondent did not move to withdraw his guilty pleas to the other charges, nor did he invoke, as a basis for his motion to withdraw his plea to the firearms count, the district court's failure to advise him of his right to the assistance of counsel at trial. On June 22, 1998, respondent was sentenced to 97 months' imprisonment. Pet. App. 23a-24a.

5. On appeal, respondent argued for the first time that his guilty pleas on all three counts were invalid because, among other things, the district court had failed to advise him of his right to the assistance of counsel at trial, as required by Rule 11(c)(3), before accepting his guilty plea. The court of appeals found respondent's Rule 11(c)(3) claim "dispositive" (Pet. App. 13a n.1), and vacated respondent's guilty pleas (*id.* at 22a).

The court of appeals first observed that "[t]he Government correctly points out that we do not normally consider issues raised for the first time on appeal." Pet. App. 15a. The court nonetheless rejected the government's argument that respondent had forfeited his claim of Rule 11 error. Rather, it held (*ibid.*) that the normal plain-error standard of review applicable to claims of error not raised at trial, as set forth in Federal Rule of Criminal Procedure 52(b), "does not apply to Rule 11 errors," and that "Rule 11 has its own review mechanism" in Rule 11(h), "which supersedes the normal waiver rule."[4] Therefore, the court stated,

[4] Rule 11(h) provides: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

the case turns on whether "the district court's error was harmless." Pet. App. 15a.

The court of appeals noted that Rule 11(h) requires the court to "disregard variances from the colloquy that do not 'affect substantial rights.'" Pet. App. 15a (quoting Fed. R. Crim. P. 11 (h)). According to the court, the "affect[ing] substantial rights" language of Rule 11(h) "mean[s] that we must inquire whether the defendant was aware of his rights despite the judge's failure to advise him." *Ibid.* Applying that standard, the court determined that the district court's error was not harmless because the record did not contain "unequivocal evidence" that respondent was aware that he had the right to the assistance of counsel at trial. *Id.* at 16a-21a. The court rejected the government's argument that the district court's statements at the May 12, 1997, status conference concerning the need for a jury trial on the firearm charge and the impending June 10, 1997, trial date (see p. 5, *supra*), demonstrated respondent's awareness that he would be represented by counsel at trial. *Id.* at 16a-17a & nn. 3-4. The court found those statements insufficiently clear to establish with confidence respondent's awareness that he would be represented by counsel at trial. *Id.* at 18a.

The court of appeals also noted that, at respondent's September 3, 1997, change of plea hearing, the prosecutor had drawn the district court's attention to the fact that it had not specifically advised respondent of his right to counsel at trial. The court of appeals "sympathize[d]" with the government's "good faith effort" to address that deficiency below, but it determined that the transcript "does not yield the unequivocal evidence we would need before we could deem [respondent] aware of his continuing right to counsel at trial." Pet. App. 18a-19a.

6. The government filed a petition for rehearing, in which it brought to the court's attention other parts of the record demonstrating respondent's awareness of his right to the assistance of counsel at trial. In particular, the government pointed to respondent's signed acknowledgment of his constitutional rights on March 14, 1997, as well as recent transcriptions of respondent's initial appearance and arraignment proceedings, at which respondent was specifically advised of his right to counsel at trial and stated that he understood his rights. Pet. for Reh'g 9-10; see pp. 3-5, *supra*. Respondent argued, in response, that the court was precluded from relying on those pre-plea materials under its prior decisions, which limited the scope of Rule 11(h) harmless-error review to the four corners of the guilty plea hearing transcript. Resp. Opp. to Pet. for Reh'g 10-11.

The panel withdrew its opinion and issued a new one, in which it again vacated respondent's guilty pleas based on the Rule 11 violation. Pet. App. 1a-10a. The court first reaffirmed that a defendant's claim, raised for the first time on appeal, that the district court failed to provide him with part of the advice of rights required by Rule 11(c)(3) is reviewed for harmless error, rather than plain error. *Id.* at 5a-6a. The court also reaffirmed that the harmless-error analysis requires it to determine "whether the defendant was aware of his rights despite the judge's failure to advise him." *Id.* at 6a.

The court then held, based on its prior decisions, that "we are limited to what the record of the plea proceeding contains" in conducting Rule 11(h) harmless-error analysis. Pet. App. 6a. Accordingly, the court stated, "we cannot consider the government's claim that [respondent] learned of his right to counsel during earlier court proceedings" in this case. *Id.* at 6a-7a.

After reaffirming its previous conclusion that the transcript of respondent's guilty plea hearing did not unequivocally demonstrate that respondent was aware that he had the right to counsel at trial (*id.* at 7a-9a), the court vacated respondent's guilty pleas and remanded the case for further proceedings (*id.* at 10a).

SUMMARY OF ARGUMENT

The court of appeals made three separate errors in assessing the effect on respondent's conviction of the district court's deviation from Rule 11(c)(3). First, the court of appeals erred in applying a harmless-error standard (which is applicable to preserved error) rather than a plain-error standard (which is applicable to claims, such as respondent's, that are raised for the first time on appeal). Second, the court of appeals applied an erroneous test for determining prejudice (under either the harmless-error or the plain-error standard), by asking only whether the defendant was aware of the information omitted from the Rule 11 colloquy from another source, rather than asking whether the error had an effect on the outcome of the proceedings; the court also erred by failing to reach the discretionary component of plain-error review, under which reversal for error is not warranted when the error did not affect the fairness, integrity, or public reputation of the proceedings. Third, the court of appeals erroneously conducted appellate review by looking only to the guilty plea record to determine whether the Rule 11 error required reversal, rather than conducting appellate review based on the entire district court record. Taking into account the entire record, it is clear that respondent was aware, from advice given at earlier court proceedings in this case, of his right to counsel at trial, which the district court erroneously failed to state

at the time of taking the plea. Accordingly, the Rule 11 error in this case had no effect on respondent's guilty plea and does not warrant reversal.

A. Because respondent did not raise in the district court any contention that that court failed to give him advice required by Rule 11(c)(3) before accepting his guilty plea, that contention may be reviewed in the court of appeals only for plain error. The principle that a party, including a criminal defendant, forfeits a claim of error if that claim is not properly presented to the trial court is a basic feature of our justice system. The "raise-or-forfeit" rule serves two complementary interests. First, it promotes judicial economy by ensuring that claims of error are brought to the attention of the trial court so that it may correct itself and prevent the risk that the entire proceeding will later be overturned. Second, it also prevents parties from manipulating the system by allowing courts to lapse into error without objection and then using that error to overturn an unfavorable result after the passage of time. Both interests are applicable in the context of a deviation from Rule 11(c)(3)'s requirement that the defendant be advised of his right to counsel at trial. If respondent's counsel had brought the district court's error to its attention, then that court might have corrected itself and provided the missing component of the advice required by the Rule. Similarly, if respondent had filed a timely motion to withdraw his plea on that ground, the district court could have developed a full record and the parties would have had the opportunity to assess the situation promptly. The raise-or-forfeit rule also prevents a defendant from raising a Rule 11(c)(3) error for the first time on appeal, after the government's evidence may have become stale

or merely because he was dissatisfied with the sentence that the district court imposed.

The only basis for appellate review of a forfeited claim in the federal system is found in Rule 52(b), which permits a court of appeals to notice plain error even if it was not raised below by the defendant. There is no exception to the requirements of Rule 52(b) for Rule 11(c)(3) errors. Rule 11(h), which permits appellate courts to disregard nonprejudicial deviations from the procedures of Rule 11, was intended to overturn prior practice under which a district court's deviation from Rule 11 required automatic reversal of a plea-based conviction without a showing of prejudice. Rule 11(h) rejected the automatic reversal rule, but it does not supersede Rule 52(b) or preclude the application of plain-error standards when the defendant failed to raise the issue below.

B. A district court's deviation from Rule 11(c)(3) constitutes plain error only if the defendant shows both that the error affected the defendant's "substantial rights" and that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. A showing that the error affected the defendant's substantial rights requires the reviewing court to assess whether the error has affected the outcome of the proceeding. Contrary to the Ninth Circuit's view, the reviewing court is not limited to asking whether the defendant was otherwise aware of the information that the district court omitted from its Rule 11 colloquy. Evidence that the defendant was otherwise aware of that information will ordinarily be sufficient to establish that the error did not affect his decision to plead guilty, but it is not necessary to a finding of harmless error. For example, a judge may, during the Rule 11 colloquy, understate the maximum sentence to which the de-

fendant is exposed, in violation of Rule 11(c)(1), but if the ultimate sentence imposed is well below the maximum term of which the defendant was advised, the Rule 11(c)(1) error is clearly harmless. Similarly, a defendant may have such great incentives to plead guilty (for example, pursuant to a plea agreement affording a substantial reduction in sentence) that it is clear that he would have entered the plea even if there had been no deviation from Rule 11. For that reason, the proper approach to harmless-error review in the Rule 11 context focuses on the effect that the error had on the ultimate outcome of the case. That approach is consistent with this Court's harmless-error and plain-error decisions, which (in both contexts) have determined whether an error affects substantial rights by asking whether the error influenced the result of the proceeding. That approach is appropriate here, because the procedures required by Rule 11(c)(3) are not constitutional rights in themselves, but are means intended to protect the constitutional requirement that any guilty plea be voluntary and intelligent. Thus, it is appropriate in the Rule 11 context to focus on the ultimate result of the proceeding.

The inquiry into plain error contains the additional requirement that, even if a defendant shows an effect on his substantial rights, reversal is not warranted unless necessary to protect the fairness, integrity, or public reputation of judicial proceedings. A court of appeals should not exercise its discretion to vacate the plea when the defendant's plea decision was not materially influenced by the error. Upsetting a plea-based conviction, often long after the fact, because of a violation of Rule 11 that did not have any material effect on the ultimate result of the case would undermine, rather than promote, the public perception of the fairness of the criminal process.

C. The court of appeals erred in determining the existence of prejudice solely by looking to the record of the guilty plea proceeding itself, and ignoring the entire record in the case. This Court has repeatedly explained that both harmless-error and plain-error review require consideration of the entire record in the case to determine whether a criminal defendant was prejudiced by a trial court's error. That principle applies in the guilty plea context when a defendant contends that he was prejudiced by the district court's departure from Rule 11(c). In some cases the record may demonstrate persuasively that the district court's omission had no effect on the outcome of the case. For example, the record may demonstrate that the error was of no import because the defendant had previously been provided with the omitted information by the district court or by counsel. There is no reason why a reviewing court should refuse to consider such highly relevant evidence when determining whether a failure to observe all the requirements of Rule 11(c)(3) affected the outcome of the proceeding.

D. Under the proper standards, the district court's failure to comply with Rule 11(c)(3) was not reversible error in this case. The record in this case shows that, before respondent entered his guilty pleas, he had already been informed of, and had acknowledged, his constitutional right to the assistance of counsel at trial. The departure from Rule 11(c)(3) thus omitted information that respondent, who pleaded guilty with counsel by his side, already knew. Thus, respondent cannot demonstrate that the district court's failure to provide him with the same information about that right

at his guilty plea hearing affected his decision to plead guilty.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO ADVISE RESPONDENT, AS REQUIRED BY RULE 11(C)(3), OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL AT TRIAL WAS NOT REVERSIBLE ERROR IN THIS CASE

A. The Omission Of Advice Required By Rule 11(c)(3) Is Reviewable Only For Plain Error If The Defendant Has Failed To Raise The Claim Of Error In The District Court

1. a. "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (internal quotation marks omitted); *Daniels* v. *United States*, No. 99-9136 (Apr. 25, 2001), slip op. 7. As the Court has explained, the rule requiring a party to make a timely presentation of a claim of error in the trial court in order to preserve the claim for appeal serves two important purposes. First, the rule promotes judicial economy and efficiency by ensuring that the claim of error will be brought to the district court's attention at a time when that court may correct it. The rule thus reduces the likelihood that an error will jeopardize the entire judicial proceeding and require a retrial. See *United States* v. *Gagnon*, 470 U.S. 522, 529 (1985); *Luce* v. *United States*, 469 U.S. 38, 41-42 (1984); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

Second, the rule diminishes the risk of unfair surprise and manipulation of the litigation by a party. It prevents parties from using their silence to allow the district court to pursue an erroneous course and then claim on appeal—after judgment has been entered, time has passed, memories have faded, and witnesses may have become unavailable—that the error requires reversal. See *Wainwright* v. *Sykes*, 433 U.S. at 89; *Luce*, 469 U.S. at 42; *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976).

b. The purposes of the "raise-or-forfeit" rule requiring a timely claim of error in the trial court are fully applicable in the context of a district court's failure to provide a defendant all the advice required by Rule 11(c)(3). First, requiring presentation of that claim of error to the trial court promotes judicial economy. If respondent's counsel had brought to the trial court's attention the fact that it had omitted part of the advice required by Rule 11, the court could have corrected itself immediately and thus precluded the possibility that the error would later lead to vacatur of the guilty plea on appeal and a remand for new proceedings.[5]

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[5] The defendant's obligation to bring the error to the trial court's attention is not lessened by the fact that conscientious prosecutors will also try to call Rule 11 error to the court's attention. Here, for example, the prosecutor told the court that she could not remember the court's having advised respondent of his right to *counsel*. See p. 7, *supra*. But she did not expressly refer to respondent's right to *counsel at trial*, which is not the same thing. Compare Fed. R. Crim. P. 11(c)(2) (court must advise an unrepresented defendant that he has "the right to be represented by an attorney at every stage of the proceeding") with Fed. R. Crim. P. 11(c)(3) (court must advise a represented defendant that he has "the right to be tried by a jury and at that trial the right to the assistance of counsel"). The court, moreover, erroneously told the prosecutor in response that it was not required to advise a counseled defendant that he had a right to counsel at trial, perhaps confusing Rule 11(c)(2) with Rule 11(c)(3). In these circumstances,

Indeed, even if respondent had raised his claim of error after the district court accepted his guilty plea but before it imposed sentence, that presentation of the claim would have promoted judicial economy by allowing the district court to make a determination, based on an adequate record, whether there was a "fair and just reason" to allow respondent to withdraw his plea under Federal Rule of Criminal Procedure 32(e). As the Seventh Circuit has recently observed, "[a] motion to withdraw a plea entered after defective procedures enables the district court to build the sort of record that is essential to understanding the effect of any noncompliance with Rule 11; it also permits the district judge to take the plea anew and thus avoid the delay that attends appeal—delay that may undermine the accuracy of any ensuing trial, for memories may fade or evidence be lost as time passes." *United States* v. *Driver*, 242 F.3d 767, 770 (2001); see also *United States* v. *Lopez-Pineda*, 55 F.3d 693, 697 (1st Cir.) (observing that the failure to raise a Rule 11 challenge before sentencing "denie[s] the government any opportunity to develop the district court record with a view to whether or not [the defendant] was misinformed"), cert. denied, 516 U.S. 900 (1995). A motion to withdraw the plea in the district court before sentencing also serves to "dispel [any] uncertainty about whether the defendant *really* wants to withdraw his plea, give up the consideration received for the plea bargain * * *, and go to trial." *Driver*, 242 F.3d at 770.

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an objection by defense counsel pointing out the difference between the two Rules might well have dispelled the confusion and led the court to make a proper advice of rights to respondent.

Second, applying the raise-or-forfeit rule to Rule 11(c)(3) violations also discourages unfair manipulation by defendants. In particular, it prevents defendants from attempting to withdraw their guilty pleas merely because they are unhappy with the sentence, even when they were fully aware at the time they entered their guilty pleas that the sentence might be lengthy or could not then be determined with certainty. In this case, for example, when respondent entered his first guilty plea, the court expressly advised him that it could not determine at that time what the sentence would be, and warned him that he would not be allowed to withdraw his guilty plea merely because he did not like the sentence. J.A. 39. The court gave respondent a similar warning before it accepted his second guilty plea. J.A. 57. But a rule allowing defendants in respondent's situation to raise a claim of Rule 11 error for the first time on appeal, without having to meet the plain-error standard, could be readily abused in a manner that would permit defendants to withdraw their guilty pleas merely because of second thoughts about the sentence.[6] A defendant might also seek, at some point after sentencing, to upset his plea because of changed circumstances that would make it more difficult for the government to prove guilt (such as the death or disappearance of witnesses). By facilitating such mani-

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[6] In many cases, defendants enter into guilty pleas pursuant to Rule 11(e)(1)(B), under which the prosecutor recommends a particular sentence, but that recommendation is not binding on the court, and the court must expressly advise the defendant that, even if it rejects the prosecutor's recommendation, the defendant nonetheless has no right to withdraw the plea. See Fed. R. Crim. P. 11(e)(2). The court of appeals' approach would allow such a defendant to seize on unpreserved error in the Rule 11 colloquy and obtain reversal motivated by unhappiness with the sentence.

pulations, the Ninth Circuit's approach tends to convert "the otherwise serious act of pleading guilty into something akin to a move in a game of chess." *United States* v. *Hyde*, 520 U.S. 670, 677 (1997).

2. a. The exclusive means for obtaining review on direct appeal of a trial court's error that the defendant failed to raise in the district court is set forth in Rule 52(b) of the Federal Rules of Criminal Procedure. Rule 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52(b) recognizes that a "rigid and undeviating" judicial practice of declining to review forfeited errors would be out of keeping with "the rules of fundamental justice." *Olano*, 507 U.S. at 732 (internal quotation marks omitted). Nevertheless, in light of the important purposes served by the requirement that claims of error be raised initially in the trial court, the authority created by Rule 52(b) to set aside criminal convictions based on plain error is "circumscribed," *ibid.*, and "to be used sparingly," *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). See also *United States* v. *Young*, 470 U.S. 1, 15-16 (1985). To obtain relief under Rule 52(b), a defendant must show that there is an "'error' that is 'plain' and that 'affects substantial rights.'" *Olano*, 507 U.S. at 732; see *Johnson* v. *United States*, 520 U.S. 461, 467 (1997). In addition, "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 732 (quoting *Young*, 470 U.S. at 15); see *Johnson*, 520 U.S. at 467.

Despite this Court's statement in *Olano* that the raise-or-forfeit rule applies with respect to "any * * * sort" of error, see 507 U.S. at 731, the court of appeals declined to review respondent's claim under the plain-error standard. The court of appeals instead employed the standard of harmless error, which requires reversal unless the government shows that the error had no effect on the outcome of the proceeding. In so doing, it relied on Rule 11(h), which states that "[a]ny variance from the procedures required by [Rule 11] which does not affect substantial rights shall be disregarded." See Pet. App. 5a. The language of Rule 11(h) is similar to that of Rule 52(a), which sets forth the general harmless-error standard for claims of error that have been preserved by a timely objection.[7] The courts that have held that a Rule 11(c) violation must be reviewed under a harmless-error standard, even when a defendant failed to raise the claim of error in the district court, have relied principally on the similarity of language between Rule 11(h) and Rule 52(a). They have also noted that, although Rule 11(h) expressly provides that Rule 11 errors may be harmless, it does not on its face make any provision for plain-error review of claims not raised in the district court. Those courts have reasoned that, because Rule 11(h) is directed specifically at appellate review of Rule 11 errors, Rule 11(h) exclusively governs such claim of error, and Rule 52 has no operation at all.[8]

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[7] Rule 52(a) states: "Harmless error: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[8] See Pet. App. 5a ("Rule 11 has its own review mechanism, which supersedes the normal waiver rule."); *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998); *United States* v. *Lyons*, 53 F.3d 1321, 1322 n.1 (D.C. Cir. 1995).

Contrary to that analysis, nothing in Rule 11(h) forecloses application of the plain-error standard of Rule 52(b) when a defendant fails to make a timely objection in the district court to a violation of Rule 11. Rule 11(h) merely provides that a violation of Rule 11 does not justify reversal when it is not prejudicial. It does not address the applicable standard of review when the defendant fails to preserve a claim in district court—an omission that regularly changes the standard of review to require a more demanding showing by the defendant. "Rule 11(h) does not override Rule 52(b) * * *; it simply restates the approach applicable when a claim of error has been preserved in the district court." *Driver*, 242 F.3d at 770. Like Rule 52(a) on which it it modeled, Rule 11(h) thus states the rule for review of preserved claims of Rule 11 error; but neither Rule 11(h) nor Rule 52(a) purports to displace the additional requirements of Rule 52(b) for review of unpreserved claims.[9]

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[9] Rule 52(a) was derived from former 28 U.S.C. 391 (1940), entitled "New trials; harmless error," which provided, in language similar to that of the present Rule 52(a): "On the hearing of any appeal * * * the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." See Fed. R. Crim. P. 52(a) advisory committee's note (observing that Rule 52(a) "is a restatement of existing law, 28 U.S.C. former § 391 (second sentence)"). Before adoption of the Federal Rules of Criminal Procedure, there was no similar broad statutory provision directly analogous to the present Rule 52(b) authorizing appellate courts to notice plain errors not brought to the attention of the lower courts. Nonetheless, the courts recognized long before the adoption of the Federal Rules *both* that they had the power to reverse judgments infected by plain error (indeed, some courts had codified that practice in their own procedural rules) *and* that that power should be exercised sparingly and only in compelling cases. Compare, *e.g.*, *Weems* v. *United States*, 217 U.S. 349, 362 (1910) (reversing for plain error), with *Holmgren* v. *United States*, 217 U.S. 509, 521 (1910) (declining to do so). This Court's definitive articulation of the plain-error standard in *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936), also predated the adoption of the Federal Rules. See *Young*, 470 U.S. at 6-7 (noting that *Atkinson* standard was later codified in Rule 52(b)). No court drew from the text of former Section 391, establishing a harmless-error rule that permitted reversal only when errors affected a substantial rights, a negative inference that precluded the higher standard of plain-error review when there was no timely objection below. To the contrary, the plain-error standard (with its more demanding requirements) was developed against the background of a general statutory rule of reversal for error that affected substantial rights.

b. The background of Rule 11(h) confirms that it should not be construed to foreclose the applicability of Rule 52(b) to claims of Rule 11 error that were not preserved in the district court. Rule 11(h) was intended to abrogate prior holdings that a district court's deviation from the procedural requirements of Rule 11 required reversal of the conviction, without a showing of prejudice to the defendant in the particular case. See Fed. R. Crim. P. 11(h) advisory committee's note [hereinafter 1983 Advisory Committee Note]. Rule 11(h) thus made clear that a Rule 11 violation that does not affect substantial rights, *i.e.*, that is not prejudicial, does not require reversal.

Rule 11(h) was enacted in response to three developments. The first was this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969). In that case, the district court violated the requirement of Rule 11 that it personally inquire of the defendant whether he understood the charges against him before accepting his guilty plea. This Court reversed the conviction and held that Rule 11 mandates that the court inquire into the defendant's understanding of the nature of the

charges and the consequences of his guilty plea. *Id.* at 464-467. The Court then concluded that such a violation of Rule 11 required reversal of the conviction without a specific showing of prejudice. The Court reasoned that failure to comply with Rule 11 was inherently prejudicial, because the defendant was denied the "procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." *Id.* at 471-472. The Court also explained that automatic reversal for Rule 11 violations would "help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." *Id.* at 472.[10]

[10] Although *McCarthy* held that a violation of Rule 11 required reversal, it does not stand for the proposition that Rule 11 violations not raised in district court are exempt from the raise-or-forfeit rule. The Court's decision in *McCarthy* did not address that issue, and did not indicate whether defense counsel had objected to the Rule 11 violation in the district court. (In fact, although defense counsel did not object to the violation in the trial court, the government also waived any forfeiture argument on appeal. See U.S. Mem. in Opp. at 1 & n.1, *McCarthy* v. *United States*, *supra* (No. 1209, O.T. 1967).) As this Court has recognized, there is no inconsistency between a rule requiring reversal when a claim of error has been properly preserved in the district court and a rule permitting only plain-error review of the same claim when it has not been properly preserved. Compare *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984) (holding that a denial of the right to a public trial is not subject to harmless-error review), with *Levine* v. *United States*, 362 U.S. 610, 619 (1960) (holding that the failure to object to closure of the proceedings may result in a forfeiture of the right to a public trial); and compare *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986) (holding that racial discrimination in the selection of the grand jury can never be harmless error), with *Davis* v. *United States*, 411 U.S. 233, 245 (1973) (on collateral challenge under 28 U.S.C. 2255, stating that "[t]he presumption of prejudice which

See also *Halliday* v. *United States*, 394 U.S. 831, 832 (1969) (per curiam).

The second development leading to the adoption of Rule 11(h) was the 1975 amendment to Rule 11, which required a significantly more elaborate colloquy between a district court and the defendant before the court accepts a guilty plea. At the time *McCarthy* was decided, Rule 11 required only that the court "address[] the defendant personally and determin[e] that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea," and that the court satisfy itself "that there is a factual basis for the plea." Fed. R. Crim. P. 11 (1966). As the 1983 Advisory Committee Note accompanying Rule 11(h) observed, under that earlier version of Rule 11, "the chances of a minor, insignificant and inadvertent deviation were relatively slight," and therefore *McCarthy*'s automatic-reversal rule "may have been justified." 1983 Advisory Committee Note, *supra*. But in light of the more elaborate procedures set out in the amended Rule 11, "the chances of a *truly* harmless error" became much greater than had been the case under the version before the Court in *McCarthy*. *Ibid.*

The third development contributing to the adoption of Rule 11(h) was the Court's decision in *United States* v. *Timmreck*, 441 U.S. 780 (1979), holding that collateral relief under 28 U.S.C. 2255 may not be predicated on a violation of the formal requirements of Rule 11. As the 1983 Advisory Committee Note also explains, that holding significantly undercut a major justification for

supports the existence of the right [against racial discrimination in grand jury selection] is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner").

the automatic-reversal rule adopted in *McCarthy*. One purpose of that rule was to alleviate the burden faced by Section 2255 courts in resolving post-conviction challenges to guilty pleas that raised disputes about the understandings held by the defendant at the time of the plea—claims that "are encouraged, and are more difficult to dispose of, when the original record is inadequate." *McCarthy*, 394 U.S. at 469-470, 472. As the Advisory Committee recognized, under *Timmreck*, mere claims of Rule 11 error, at least absent "other aggravating circumstances," 441 U.S. at 785, do not in any event warrant collateral relief. See 1983 Advisory Committee Note, *supra*.

Against that background, the purpose of Rule 11(h) is to "reject[] the extreme sanction of automatic reversal" in light of post-*McCarthy* developments by "mak[ing] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." 1983 Advisory Committee Note, *supra*. The Advisory Committee focused on the applicability of the harmless-error rule because, following the adoption of the 1975 amendments to Rule 11, "some courts [continued to] read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings." *Ibid.* But although the Advisory Committee made no specific reference to forfeiture or plain error, there was no reason for it to have done so, since the point of the amendment was to eliminate a rule requiring *automatic* reversal because of technical Rule 11 errors. It hardly follows that the Advisory Committee intended to foreclose plain-error review of *unpreserved* claims of Rule 11 error. To the contrary, the abrogation of *McCarthy*'s automatic-reversal rule effected by Rule 11(h) strongly suggests that the Advisory Committee intended that Rule 11 violations should be reviewed on

appeal under the same standards of review routinely applicable to other claims of error. Those standards include, of course, plain-error review for claims not raised in the lower court.[11]

In sum, the text and purpose of Rule 11(h), directing that harmless-error review be applied to claims of Rule 11 error, do not foreclose or supersede the application of standard plain-error analysis to claims that were not presented in the lower court.

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[11] The Federal Rules of Criminal Procedure contain other specific harmless-error provisions, which likewise do not supersede other rules of general applicability governing waiver and forfeiture. For example, Federal Rule of Criminal Procedure 7(c)(3), which concerns indictments and informations, contains a specific harmless-error provision: "[e]rror in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice." By reducing the danger that an erroneous citation will result in dismissal or reversal, the provision is intended to encourage prosecutors to cite the particular statute alleged to have been violated. See Fed. R. Crim. P. 7(c) advisory committee's note. Like Rule 11(h), Rule 7(c)(3) is entitled "Harmless Error," and just as Rule 11(h) makes no reference to forfeiture or plain-error review, Rule 7(c)(3) makes no reference to the rule, set forth in Federal Rule of Criminal Procedure 12(f), that challenges to an indictment are waived unless made before trial. Yet there is no plausible reason why the Advisory Committee would have wanted to eliminate the waiver rule of Rule 12(f) when a defendant complains for the first time on appeal of a miscitation in the indictment. Indeed, treating a failure to timely raise a Rule 7(c)(3) claim as a waiver would advance the goal of encouraging prosecutors to include citations in indictments by minimizing the risk of reversal for citation errors. Rule 7(c)(3) thus demonstrates that the inclusion of a specific harmless-error provision in a rule of criminal procedure does not supersede other rules governing waiver and forfeiture.

3. There is nothing in the nature of a Rule 11(c)(3) violation that should exempt it from the operation of the raise-or-forfeit rule. The purpose of Rule 11 is to protect the defendant from "an unintelligent or involuntary plea." *Mitchell* v. *United States*, 526 U.S. 314, 322 (1999). The advice required by Rule 11(c)(3) also supports the constitutional requirement that the record contain "an affirmative showing that [the guilty plea] was intelligent and voluntary." *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); see Fed. R. Crim. P. 11(c) advisory committee's note (1974 amend.). But the specific colloquy required by Rule 11(c)(3) is not itself constitutionally mandated (see *McCarthy*, 394 U.S. at 465; *Halliday*, 394 U.S. at 832-833), and the advice required by Rule 11(c)(3) is not a goal in and of itself but rather a means to ensure the voluntariness and intelligence of the defendant's plea.

Contrary to the court of appeals' view (see *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998)), principles of waiver and forfeiture are applicable to Rule 11 errors, notwithstanding the assignment of responsibility to the district court to meet Rule 11's requirements even without a specific request from the defendant. Defense counsel still has the obligation to call to the court's attention that it has committed legal error, as a timely objection would easily permit the error to be avoided or cured. The requirement that a court undertake the procedures mandated by Rule 11(c)(3) before accepting a guilty plea is no more obvious or mandatory than (for example) the prohibition in Rule 24(c) against allowing alternate jurors to be present during jury deliberations, and yet this Court has held that the latter error is forfeited if not brought to the court's attention at trial. See *Olano*, 507 U.S. at 737-741.

The court of appeals therefore erred in applying harmless-error, rather than plain-error, analysis when determining whether the district court's failure to comply with all of Rule 11(c)(3) warranted vacatur of the conviction. As we now explain, the court of appeals also made two other related errors in concluding that respondent's Rule 11 claim warranted vacatur of his guilty plea.

B. A Showing Of Plain Error In A Guilty Plea Colloquy Requires A Finding That The Error Affected The Outcome Of The Proceeding

1. As this Court has explained, plain-error analysis consists of four inquiries:

> [B]efore an appellate court can correct an error not raised [in the trial court], there must be (1) "error," (2) that is "plain," and (3) that "affects substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings."

Johnson, 520 U.S. at 466-467 (further brackets, citations, and internal quotation markets omitted). Thus, before setting aside a conviction based on plain error, the reviewing court must find that the error was prejudicial to the defendant—*i.e.*, that it affected the defendant's "substantial rights." See *ibid.*; *Olano*, 507 U.S. at 734. The harmless-error standard of Rule 52(a) contains a similar requirement that the error must affect substantial rights for a conviction to be reversed. See *ibid.* The principal difference between the prejudice inquiry conducted under Rule 52(a) and that conducted under Rule 52(b) is that plain-error review re-

quires the defendant, rather than the government, to bear the burden of persuasion on prejudice. *Ibid.*

In this case, the court of appeals was mistaken not only in assigning the burden of persuasion to the government, but also in its articulation of the element of prejudice from a Rule 11(c)(3) error. The court stated that, to establish the requisite prejudice under a harmless-error analysis, the government was required to prove that respondent "was aware of his rights despite the district court's failure to apprise him." Pet. App. 6a. The ultimate test of prejudice, however, is whether the error affected the outcome of the proceeding. While a defendant's awareness of his rights is one method to establish the lack of prejudice, it is not the sole inquiry. If the defendant would have pleaded guilty even in the absence of the error, whether because he was actually aware of his rights or for some other reason, then the error had no effect on the defendant's substantial rights, and there is no basis for vacating the guilty plea under either the harmless-error or the plain-error rule.[12]

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[12] In other contexts, the absence of an effect on the outcome may be shown by a comparison between the advice the defendant received in the Rule 11 colloquy and the ultimate sentence imposed. For example, a Rule 11 error does not affect substantial rights when the district court provides the defendant with erroneous information about the maximum possible sentence that the defendant might receive, but then imposes a sentence within the range described. See, *e.g.*, *United States* v. *Raineri*, 42 F.3d 36, 42-43 (1st Cir. 1994) (district court's erroneous information to defendant about the maximum sentence was harmless when the court imposed a sentence within the maximum term it had identified in the Rule 11 colloquy, and there was no reason to conclude that the defendant had any expectation of a lesser penalty), cert. denied, 515 U.S. 1126 (1995); *United States* v. *Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996) (district court's failure to inform the defendant

2. This Court's decisions make clear that the proper test for harmless error under Rule 52(a) is whether the error affected the "outcome" or "result" of the particular proceeding. See, *e.g.*, *Olano*, 507 U.S. at 734; *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); *Rose* v. *Clark*, 478 U.S. 570, 582 n.11 (1986); *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986); *Berkemer* v. *McCarty*, 468 U.S. 420, 444 (1984); *Chapman* v. *California*, 386 U.S. 18, 22 (1967); *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946). The Court has further explained that this approach to harmless-error analysis requires an evaluation whether the outcome of the proceeding "would have been the same" absent the error, or whether the error "changed the result" of the proceeding. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 402 (1999); *Neder* v. *United States*, 527 U.S. 1, 17 (1999); *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993); *Yates* v. *Evatt*, 500 U.S. 391, 405 (1991); *Chapman*, 386 U.S. at 23. The Court has employed this

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under Rule 11(e)(2) of his right to withdraw his plea was rendered harmless by the court's imposition of the sentence recommended by the government); *United States* v. *McCarty*, 99 F.3d 383 (11th Cir. 1996) (district court's failure to mention possibility of restitution order during Rule 11 colloquy was harmless error, since defendant had notice that he might be required to pay a fine of even greater amount than the restitution that was ordered). The 1983 Advisory Committee specifically acknowledged that form of harmless error. See 1983 Advisory Committee Note, *supra* (Rule 11 error could be found harmless when "the judge's compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings"). That principle illustrates that the general test for finding a lack of an effect on the outcome requires a context-specific analysis of the particular error and its actual effect.

test not only in determining whether an error at trial might have affected the jury's verdict,[13] but in other types of proceedings as well, including bail hearings (*Montalvo-Murillo*, 495 U.S. at 722), grand jury proceedings (*Bank of Nova Scotia*, 487 U.S. at 263), and sentencing proceedings (*Jones*, 527 U.S. at 394-395; *Williams* v. *United States*, 503 U.S. 193, 203 (1992)).

Plain-error analysis similarly requires the reviewing court to determine whether the error affected the result of the pertinent proceeding. In *Olano*, the Court observed that the requirement of plain-error review under Rule 52(b) that the error must have "affec[ted] substantial rights" means that "in most cases * * * the error must have been prejudicial: It must have *affected the outcome* of the district court proceedings." 507 U.S. at 734 (emphasis added); see also *Jones*, 527 U.S. at 395 (whether any alleged error in the district court's instructions in a capital sentencing proceeding affected the defendant's substantial rights within the meaning of Rule 52(b) turned on "[the error's] effect on the outcome of the proceeding"). Accordingly, to meet his burden of showing that an unpreserved error should be corrected on appeal, a defendant must show that the outcome of the proceeding would have been different but for the error.

In determining whether a Rule 11(c)(3) violation affected the defendant's substantial rights, an appellate court must focus on the impact of the violation on the outcome of the proceeding. And that focus includes an inquiry into whether the defendant would have pleaded

[13] See, *e.g.*, *Neder*, 527 U.S. at 17; *Yates*, 500 U.S. at 405; *Chapman*, 386 U.S. at 25-26; *Kotteakos*, 328 U.S. at 764-765.

guilty even in the absence of the violation.[14] The Court's decision in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), is instructive in this regard. The issue in *Hill* was whether any deficiency in defense counsel's performance in advising the defendant to enter a guilty plea was sufficiently prejudicial to qualify as ineffective assistance of counsel under the test set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Under the "prejudice" prong of the *Strickland* test, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, "the result of the proceeding would have been different." *Id.* at 694. Adapting the *Strickland* test for prejudice to the guilty plea context, the Court in *Hill* held that the pertinent inquiry is whether, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

The court of appeals in this case did not ask whether respondent would have pleaded guilty, even absent the omission of the Rule 11(c)(3) advice, nor did it ask generally whether the error had an effect on the outcome. Rather, it adopted an unduly narrow view of prejudice flowing from a Rule 11 violation by considering only whether respondent knew from some other source the information that the court erroneously omitted.[15] This Court, however, has clearly indicated

[14] See *United States* v. *Gandia-Maysonet*, 227 F.3d 1, 4 (1st Cir. 2000); *United States* v. *Glinsey*, 209 F.3d 386, 395 (5th Cir.), cert. denied, 121 S. Ct. 282 (2000); *United States* v. *Lyons*, 53 F.3d at 1323; *United States* v. *Wright*, 930 F.2d 808, 810 (10th Cir. 1991).

[15] See Pet. App. 6a ("Under Rule 11(h), we must disregard variances from the colloquy that do not 'affect substantial rights.' Fed. R. Crim. P. 11(h). We have interpreted this to mean that we must inquire whether the defendant was aware of his rights despite the judge's failure to advise him.").

that the proper harmless-error test requires an examination of whether the error affected the outcome of the proceeding. See pp. 31-32, *supra*. That is not to say that the defendant's knowledge of the erroneously omitted information is irrelevant to a proper prejudice analysis. To the contrary, if the defendant was otherwise aware of the omitted advice from another source (because, for example, he received the same information at an earlier court hearing) but nonetheless pleaded guilty, that would ordinarily be sufficient to establish that the district court's failure to provide him with the information at the plea colloquy did not affect his plea. In such a case, the violation clearly did not affect the defendant's substantial rights.[16]

But the inquiry into whether the outcome of the proceeding was affected is broader than the inquiry into whether the defendant was otherwise aware of the omitted information. There are circumstances in which a court could confidently conclude, even without a showing that the defendant knew of the omitted information from another source, that the defendant's determination to plead guilty would not have been affected by the information omitted from the plea colloquy. For

[16] That principle, considered in light of the entire district court record, is sufficient to resolve this case because it is clear that, when respondent pleaded guilty, he was already aware that he had the constitutional right to the assistance of counsel at trial. See pp. 3-5, *supra*. If the court of appeals had reviewed the entire record in the case in making the prejudice determination, as we submit it should have done (see pp. 38-45, *infra*), rather than limiting its scope of review to the transcript of the guilty-plea colloquy, it should have concluded that respondent was already aware of the information that the district court failed to provide him and therefore was not prejudiced by the district court's deviation from Rule 11(c)(3).

example, a defendant might have received a significantly reduced sentence and a nominal fine for pleading guilty. In such a case, a reviewing court could properly find that the district court's failure to inform the defendant of his exposure to a fine, as required by Rule 11(c)(1), did not prejudice him because, in the circumstances, he surely would have pleaded guilty even with advice about the fine. Similarly, in a case where the defendant receives a substantial reduction in sentence pursuant to a negotiated plea agreement but is never informed of a relatively insignificant direct consequence of his plea, a reviewing court could conclude that the outcome would not have been different if the defendant had been aware of the omitted information at the time he entered his plea. See *United States* v. *Littlejohn*, 224 F.3d 960, 969-970 (9th Cir. 2000). See also pp. 30-31, note 12, *supra*.[17]

[17] In *Henderson* v. *Morgan*, 426 U.S. 637 (1976), this Court touched briefly on the question whether an involuntary guilty plea may be found to be harmless error. The Court in *Henderson* concluded that a defendant's guilty plea to intentional murder was involuntary because, in the plea colloquy, neither the trial court nor his lawyer had advised him of the intent-to-kill element of the crime. See *id.* at 645-647. The Court "assume[d]" that the defendant "probably would have pleaded guilty anyway," if he had been advised of the intent element, but found that "assumption" insufficient to prevent a finding that the guilty plea was involuntary at the time it was entered. *Id.* at 644 n.12. And the Court found that the error was not "harmless beyond a reasonable doubt," because the defendant's "unusually low mental capacity" suggested that he might have had a defense to the intent-to-kill element of the crime, thereby reducing the offense to manslaughter. *Id.* at 647. The Court thus implied that if no conceivable defense could have been offered, the error would have been harmless.

Henderson dealt with a constitutionally defective plea entered in the New York state court system, and this Court did not

3. Plain-error review under Rule 52(b) has as its final component an inquiry into whether the court of appeals should exercise its discretion to correct a prejudicial error because the error affected the "fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467; *Olano*, 507 U.S. at 736. Even if the court of appeals were correct in this case in its narrow understanding of when a Rule 11 error is prejudicial—and, as we have discussed above (pp. 31-35, *supra*), the court of appeals' approach is not correct—the fourth component of plain-error review would preclude vacatur of a guilty plea when the violation had no material effect on the proceedings. See *Johnson*, 520 U.S. at 469-470 (assuming that erroneous omission of an element from jury instructions affected substantial rights, but declining to reverse for plain error where the evidence supporting the omitted element was "overwhelming" and "uncontroverted").

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address the implications of plain error review under Federal Rule of Criminal Procedure 52(b). *Henderson* is also different from this case in that the error there was the failure to inform the defendant of the "true nature of the charge against him, the first and most universally recognized requirement of due process," *Henderson*, 426 U.S. at 645 (quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941)), and that error meant that the defendant never admitted every essential element of the crime. *Id.* at 649 (White, J., concurring); see also *Bousley* v. *United States*, 523 U.S. 614, 618-619 (1998). Nevertheless, the Court in *Henderson* suggested that the error in that case could have been found harmless if there was, in fact, no defense to the intent element. See 426 U.S. at 647. If error of the magnitude involved in *Henderson* can be harmless when it has no effect on the outcome, then a Rule 11 procedural error in the federal system that does not rise to the level of a constitutional violation surely can be harmless when the error has no effect on the outcome.

The stability of convictions based on guilty pleas is particularly important to the criminal justice system. The prosecution focuses considerable energy on preparing to prove its charges in the trial court, and a guilty plea means that those preparations are no longer necessary. Victims and witnesses rely on the finality of the disposition, and the court system moves on to other business. A rule of procedure that freely allowed a defendant to escape his plea, long after its entry, without having raised claim of a Rule 11 defect in the trial court, and without even claiming actual innocence of the offense, would not serve to vindicate the integrity, fairness, or public reputation of judicial proceedings. Rather, such a rule would undermine those values, and potentially force the adjudication of criminal charges after memories have faded and witnesses become unavailable. Accordingly, the discretionary component of plain-error analysis should not permit reversal if a defendant acted knowingly and voluntarily in pleading guilty and the specific advice that the district court failed to provide would have been immaterial to the defendant's plea decision. In those circumstances, there is no basis for a court to conclude that a "miscarriage of justice" would result if he is not allowed to withdraw his plea. Cf. *Olano*, 507 U.S. at 736; *Young*, 470 U.S. at 15.

As the Court stressed in *Johnson*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." 520 U.S. at 470 (quoting Roger Traynor, *The Riddle of Harmless Error* 50 (1970)). A rule that would allow a defendant to enter a solemn plea of guilty knowingly and voluntarily and without raising any objections, and then, after sentence and entry of judgment, escape the effect of his guilty plea

because of an error that is of no importance to his decision to plead guilty, would elevate minor flaws over substantial justice. That is not a system of justice that would command public confidence. Cf. *Mechanik*, 475 U.S. at 72 (noting that "[t]he reversal of a conviction entails substantial social costs" and that the "balance of interest" tilts against reversal "when an error has had no effect on the outcome of" the proceeding).

C. A Reviewing Court Should Consider The Entire Record In The Case To Determine Whether A Rule 11(c)(3) Violation Was Prejudicial

In determining whether the district court's Rule 11(c)(3) error affected respondent's "substantial rights," the court of appeals limited its review of the record to the transcripts of the plea colloquy proceedings. See Pet. App. 6a. The court thus declined to consider other relevant evidence in the record bearing on respondent's awareness of his constitutional rights and his decision to plead guilty, including the transcripts of respondent's initial appearance and arraignment, his signed form acknowledging his constitutional rights, and his counsel's signed acknowledgment that respondent had read and understood the rights explained to him in the form.[18] The court of appeals' refusal to consider rele-

[18] As the government noted in its rehearing petition, respondent's initial appearance and arraignment proceedings were not transcribed until after the court of appeals issued its initial opinion in this case. As a result, the government moved to supplement the record in the court of appeals with those materials when it filed its rehearing petition. As respondent acknowledged below, "all these transcripts were in the district court record." See Resp. Opp. to Pet. for Reh'g 3 n.1. The court of appeals did not formally rule on the government's motion to supplement the record. It appears that the court considered that motion to be moot or irrelevant in light of its decision, on rehearing, that it could not consider any information other than the transcript of the guilty plea hearing to determine whether respondent had been prejudiced by the Rule 11 error. Pet. App. 6a-7a ("Thus, we cannot consider the government's claim that [respondent] learned of his right to counsel during earlier court proceedings").

vant record evidence outside the four corners of the plea colloquy transcripts is inconsistent with a proper understanding of both plain-error and harmless-error review.[19]

1. This Court has repeatedly stated that "the harmlessness of an error is to be judged after a review of the entire record." *Yates*, 500 U.S. at 405; see also *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998) (error to be reviewed "in the whole context of the particular case"); *Williams*, 503 U.S. at 203 ("a remand is appropriate [to correct an error in applying the Sentencing Guidelines] unless the reviewing court concludes, on the record as a whole, that the error was harmless"); *Bank of Nova Scotia*, 487 U.S. at 256 ("a conviction should not be overturned unless, after examining the record as a whole, a court concludes that an error may have had 'substantial influence' on the outcome of the proceeding"); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) ("an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"); *United States* v.

[19] As we explain in the text at pp. 39-45, *infra*, harmless-error review as well as plain-error review requires the court of appeals to consider the entire record to determine whether the defendant was prejudiced by the district court's error. Thus, the court of appeals' incorrect decision to confine its *scope* of review to the plea proceedings in this case requires reversal, even if this Court concludes that harmless error (rather than plain error) is the proper *standard* of review on appeal in this case.

Lane, 474 U.S. 438, 448 n.11 (1986) (harmless error inquiry "requires a review of the entire record"); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983) ("entire record" must be considered).[20]

The Court has also held that plain-error review likewise requires consideration of the entire record. In *United States* v. *Young*, the prosecutor in his closing argument improperly vouched for the credibility of witnesses and expressed his personal opinion concerning the guilt of the accused. Because the defense did not object to those improper comments, the applicable standard of review on appeal was plain error. In finding that the improper comments constituted plain error, the court of appeals failed to consider that the prosecutor was countering defense counsel's repeated attacks on the prosecution's integrity and claims that the prosecutor did not personally believe in the government's case. This Court held that the court of appeals' limited focus on the prosecutor's comments alone without considering the broader context of the entire trial was flawed, and emphasized that, "[e]specially when addressing plain error, a reviewing court cannot

[20] The Court's numerous statements that harmless-error review requires examination of the record as a whole are consistent with the background of Rule 52(a). Before the adoption of that Rule, the harmless-error statute, 28 U.S.C. 391 (1946), provided that "[o]n the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after *an examination of the entire record before the court*, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties" (emphasis added). Rule 52(a), moreover, was "merely a restatement of existing law and effect[ed] no change in the 'harmless error' rule." *Bihn* v. *United States*, 328 U.S. 633, 638 n.3 (1946); see also Fed. R. Crim. P. 52(a) advisory committee's note (Rule 52(a) was "a restatement of existing law").

properly evaluate a case except by viewing such a claim against the entire record. * * * It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." 470 U.S. at 16.

The Court's directives that "the entire record" should be considered on harmless-error and plain-error review indicate that reviewing courts are not limited to examining the specific proceeding in which the error occurred, but rather should evaluate the record of the case as a whole. Indeed, this Court followed that approach in *United States* v. *Mechanik*. In that case, when the Court considered whether an error in the conduct of the grand jury proceedings required reversal of the defendant's conviction, the Court looked beyond the record of the grand jury proceedings to the result of the defendant's subsequent trial. Because "the petit jury's verdict of guilty beyond a reasonable doubt demonstrate[d] *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted" (475 U.S. at 67), the Court concluded that "any conceivable error in the charging decision that might have flowed from the violation" was "rendered harmless" (*id.* at 73).[21]

2. The principle that a court must review the entire record to determine whether an error affected the

[21] When a district court grants a defendant's pretrial motion to dismiss an indictment because of grand jury error, such that there is no trial verdict for the reviewing court to examine on appeal, the appropriate harmless-error inquiry on appeal is whether the error affected the grand jury's decision to indict. See *Bank of Nova Scotia*, 487 U.S. at 263. *Mechanik* demonstrates, however, that in other circumstances, evidence in the record other than the transcript of the grand jury proceeding itself may be relevant to determine whether error in that proceeding requires reversal.

defendant's substantial rights applies with full force to Rule 11(c)(3) violations. Indeed, restricting review of Rule 11(c)(3) errors exclusively to the guilty-plea colloquy is inconsistent with the plain intent of Rule 11(h). The Advisory Committee's Note accompanying the adoption of Rule 11(h) explains that the question of harmless-error should be resolved "solely on the basis of the Rule 11 transcript *and the other portions (e.g., sentencing hearing) of the limited record made in such cases.*" 1983 Advisory Committee Note, *supra* (emphasis added) (internal quotation marks omitted). Thus, the Advisory Committee contemplated the scope and sources of record material that a reviewing court should consider, and rejected the narrow position embraced by the court of appeals in this case, which gave no weight at all to the Advisory Committee's commentary.[22]

As the Advisory Committee's Note recognizes, record evidence outside the transcript of the guilty plea proceeding may be relevant to the determination of whether an omission to comply with Rule 11(c)(3) prejudiced the defendant. Such relevant evidence might include, for example, the court's earlier advice to the defendant of the information later omitted from the Rule 11 colloquy;[23] statements by the defendant or his

[22] Advisory Committee notes accompanying promulgation of a Federal Rule are "of weight" in construing the Rule. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); see also *United States* v. *Hyde*, 520 U.S. 670, 676-677 (1997) (relying on advisory committee's note accompanying Fed. R. Crim. P. 32(e) (1983 amend.)); *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 428-429 (1983) (relying on advisory committee's note accompanying Fed. R. Crim. P. 6(e)).

[23] See *Lyons*, 53 F.3d at 1322; *United States* v. *Gray*, 611 F.2d 194, 202 (7th Cir. 1979), cert. denied, 446 U.S. 911 (1980)).

attorney at earlier proceedings reflecting the defendant's knowledge of the omitted information;[24] a signed plea agreement or other filing in which the defendant acknowledged his awareness of the omitted information;[25] the defendant's acknowledgment at a post-guilty plea proceeding that he knew of the omitted information at the time of his guilty plea or that the omitted information had no effect on his plea;[26] or the defendant's failure to object, seek to withdraw his plea, or show surprise on being provided with the omitted information at a post-guilty plea proceeding, suggesting either that he was otherwise aware of the omitted information or that it would have had no effect on his decision to plead guilty.[27] All those kinds of evidence could have a significant bearing on whether the defendant was in fact prejudiced by the district court's failure to inform him of one of the aspects of the advice required by Rule 11(c)(3), and there is no reason why a reviewing court should blind itself to that information.

Moreover, a rule limiting the prejudice inquiry to the guilty-plea colloquy would lead to absurd results in some situations. Assume, for example, that a defendant initially elected to plead not guilty and decided to proceed to trial, but during the trial, after his attorney

[24] See *United States* v. *Peden*, 872 F.2d 1303, 1309 (7th Cir. 1989); *Gray*, 611 F.2d at 202.

[25] See *Driver*, 242 F.3d at 771; *United States* v. *Jones*, 143 F.3d 1417, 1420 (11th Cir. 1998); *United States* v. *Maher*, 108 F.3d 1513, 1521 (2d Cir. 1997); *Lopez-Pineda*, 55 F.3d at 697; *United States* v. *Vance*, 868 F.2d 1167, 1172 (10th Cir. 1989); *United States* v. *Lovett*, 844 F.2d 487, 491 (7th Cir. 1988).

[26] See *United States* v. *Saft*, 558 F.2d 1073, 1080 (2d Cir. 1977).

[27] See *Lopez-Pineda*, 55 F.3d at 697; *Lyons*, 53 F.3d at 1323; *Lucas* v. *United States*, 963 F.2d 8, 14-15 (2d Cir.), cert. denied, 506 U.S. 895 (1992).

had delivered an opening statement and had cross-examined government witnesses, the defendant changed his mind and decided to enter a guilty plea. In those circumstances, the court's failure to advise the defendant during the Rule 11 colloquy that he had the right to the assistance of counsel at trial, as required by Rule 11(c)(3), plainly should not require vacatur of the plea. In such circumstances, there could be no doubt that the defendant already knew about that right, even though his knowledge might not be reflected in the transcript of the colloquy. See *United States* v. *Dayton*, 604 F.2d 931, 946 (5th Cir. 1979) (Brown, C.J., concurring), cert. denied, 445 U.S. 904 (1980).

3. The only explanation given by the court of appeals for confining its review to the record of the plea colloquy is that the limitation "ensures that a defendant is fully aware of his rights *when his plea is entered*--that he is aware of them *at the time they are being waived.*" Pet. App. 6a (internal quotation marks omitted). That explanation, however, ignores the substantial possibility that record evidence outside the four corners of the Rule 11 proceeding, such as the factors enumerated above, might establish that the defendant knew the omitted information at the time he pleaded guilty. Even if the defendant did not state on the record at the exact moment that he entered his guilty plea that he was aware that he would have the right to counsel if he elected to proceed to trial, the record in the case might demonstrate persuasively that the defendant was aware of that right throughout the case.

More generally, the court of appeals' rationale for its limited review is predicated on the erroneous assumption that the proper test for determining whether a Rule 11(c)(3) violation prejudiced a defendant turns on whether the defendant otherwise knew about the

omitted information, rather than whether the error affected the outcome of the proceedings, including the defendant's decision to enter a guilty plea. See pp. 33-35, *supra*. The record of other proceedings in a case may establish persuasively that the defendant would have pleaded guilty even if he had been provided with the information that the court erroneously neglected to provide at the guilty plea proceeding. A reviewing court should not refuse to consider such relevant evidence.

D. The District Court's Rule 11(c)(3) Violation In This Case Was Not Plain Error

Taking into account the record of the case as a whole instead of just the guilty plea colloquies, it is clear that the district court's Rule 11(c)(3) violation did not amount to plain error. The evidence as a whole establishes that respondent was informed of the exact right at issue in earlier proceedings, and therefore the violation did not affect respondent's substantial rights or warrant vacatur of his plea.

The record as a whole shows the following:

- On February 28, 1997, at respondent's initial appearance, the district court expressly advised him of his "right to retain and to be represented by an attorney of your own choosing at each and every sta[g]e of the proceedings against [him]" and of his right to appointed counsel if he could not afford an attorney. J.A. 15.
- Later during the same proceeding, the court, addressing respondent personally, asked him if he had heard and understood his rights and

that respondent answered in the affirmative. J.A. 18.

- On March 17, 1997, at respondent's arraignment on the initial indictment, the court advised respondent once again that he had the right "to be represented by counsel at all stages of the proceedings," and that, if he could not afford an attorney, one would be appointed without cost to him. J.A. 22.
- Respondent's counsel then provided the court with respondent's signed "Statement of Defendant's Constitutional Rights," in which respondent acknowledged his constitutional right "to be represented by counsel at all stages of the proceedings against [him]." J.A. 25, 26, 28.
- Respondent's counsel also signed a statement at the end of that form indicating that counsel was "satisfied that [respondent] has read this Statement of Rights * * * and that [he] understands them." J.A. 29.
- At the conclusion of the arraignment, the court, through the clerk, asked respondent personally whether he had heard and understood the statements of the court "[p]ertaining to your rights and the appointment of counsel," and whether he had seen and signed the statement of rights that had been submitted to the court by his attorney, to both of which questions respondent answered, "Yes." J.A. 25.

In short, before he pleaded guilty on May 12, 1997, and September 3, 1997, respondent had been advised on

three separate occasions in the course of the case of his right to counsel at trial, and on four separate occasions he or his counsel affirmed that he understood that right. Two of those advisements and two of respondent's affirmations that he understood his rights took place in open court. Accordingly, the record as a whole shows that respondent knew of his right to counsel at trial when he pleaded guilty, and that the district court's error in omitting to advise him of that right at the guilty plea hearing therefore did not affect respondent's decision to enter guilty pleas.

With respect to respondent's second guilty plea, that conclusion is strongly bolstered by additional evidence. First, at the June 9, 1997, status conference, defense counsel sought and obtained in respondent's presence a continuance of the trial date because of a scheduling conflict that would have prevented the attorney from attending on the scheduled date, and the court addressed respondent personally to explain to him the need for the continuance. J.A. 47. Second, in its excludable-time order relating to the continuance of the trial date, the court stated that respondent and his attorney were "initially prepared to go forward with this case" on June 10, 1997, indicating that at some point before June 10 respondent must have become aware that his attorney would represent him at trial. Gov't C.A. Ex. Rec. 43. Finally, on August 4, 1997, at respondent's arraignment on the superseding indictment, defense counsel requested and was granted in respondent's presence additional time to prepare for trial. *Id.* at 51-52.

In light of that evidence, it is clear that respondent knew, when he pleaded guilty to the conspiracy and firearms counts on September 3, 1997 (just six days before the scheduled trial date), that his appointed

counsel would have represented him if he had chosen to proceed to trial. And at no time did respondent move to withdraw his initial guilty plea resolving the bank robbery charge. Taken together with the earlier evidence in the record showing that respondent was advised of his right to counsel at all stages of the proceeding and his acknowledgment that he understood that right, there is no basis for vacating his plea because of the district court's departure from Rule 11(c)(3). The colloquy under Rule 11 is ultimately designed to ensure the entry of knowing, voluntary, and intelligent guilty pleas; it is not designed to create a means for a defendant who knowingly, voluntarily, and intelligently entered such a plea to overturn his conviction because the trial court omitted to advise the defendant of information that he already knew.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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